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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 1298

HERMAN J. HEIDRICH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petitioner, Herman J. Heidrich, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on November 14, 1966.

OPINION BELOW

The opinion of the court below (Appendix A) and opinion on petition for rehearing (Appendix C) are not yet reported.

JURISDICTION

The opinion of the court below (Appendix A) and its judgment (Appendix B) were entered in November 14, 1966. A timely petition for rehearing was denied, with opinion (Appendix C), on March 21, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether a district court, without Congressional authorization, may engraft upon the Federal Probation Act, 18 U.S.C. §3651, its own local rule making jail time mandatory for a certain federal crime.[1]

[1]Petitioner will pursue an additional question, if certiorari is granted, namely, whether the trial court abused its discretion in refusing to grant him probation where the evidence established that his imprisonment would likely cause the fatality of his aged and infirm wife.

STATUTE INVOLVED

The Statute involved is 18 U.S.C. §3651 (Appendix D).

STATEMENT

Petitioner, who is in his seventies, along with his two sons, Francis and Paul, was charged with income tax evasion in personal and partnership returns, in violation of 26 U.S.C.§§7201 and 7206(1). In the same indictment with the three principals one Fred W. Feuerbacher was charged as an accessory with violations of 26 U.S.C. §7206(2).[2] All

[2]These statutes are reprinted in Appendix E.

entered pleas of nolo contendere to separate counts of the indictment, the three principals receiving fines, along with terms of imprisonment, and the accessory, who aided in preparing the returns, receiving only a fine.

All four defendants below paid their respective fines and petitioner's two sons both commenced and have since served their separate jail terms. Petitioner, however, prior to commencing confinement, moved to suspend execution of the confinement portion of his sentence, on the ground that medical evidence established that his wife, who was also in her seventies and quite ill, would suffer a fatal heart attack if he were imprisoned.

The trial court, while it reduced confinement to sixty days, refused to suspend confinement entirely. It did so not because of the lack of merit in petitioner's special plea but because of a standing policy, strictly adhered to in the Southern District of Florida, of imposing jail time upon anyone convicted of tax evasion.[3]

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[3]Petitioner, on his appeal to the Fifth Circuit, designated for inclusion in the record the crucial hearing here pertinent, which was held on January 22, 1965. (Tr.55) Unfortunately, but in violation of statute, 28 U.S.C.§753(b) (Appendix F), this hearing was not recorded or transcribed and petitioner was required to depend upon a stipulation. (Tr. 98-100) That stipulation, however, clearly reflects the *standing policy* of the district court of *strict adherence* to jail time for all *principals* guilty of tax evasion. (Stipulation, Paragraph 7.) (Tr.100) (See also dissenting opinion below, Appendix C.)

It must be emphasized, parenthetically, that contrary to the misunderstanding reflected in the majority opinion on rehearing (Appendix C), this standing rule of the district court below is quite clearly set out in the record. All tax "evaders", i.e. all principals [who are charged under 26 U.S.C. §7206(1)] are required to face confinement; only secretaries, accountants and bookkeepers, i.e., accessories like Feuerbacher [who are charged under 26 U.S.C. §7206(2)] have any hope for full relief from confinement for this crime in this district. This is so despite the complete absence of any such restriction having been imposed by Congress, either in the Probation Act or in the tax law.

The Court of Appeals below, which divided upon rehearing (Appendix C), affirmed the decision of the trial court.

REASONS FOR GRANTING THE WRIT

1. The decision below is in conflict with prior decisions of this Court, requiring individualized consideration in fixing the sentence of each offender. *Burns* v. *United States*, 287 U.S. 216, 53 S.Ct.154, 77 L.Ed. 266 (1932); *Williams* v. *New York*, 337 U.S.241, 69 S.Ct. 1079, 93 L.Ed.1337 (1949).

2. The decision below is in conflict with decisions of other courts of appeal, which hold invalid standing trial court policies which either narrow the Federal Probation Act *(United States* v. *Wiley*, 267 F.2d 453 (7th Cir.1959) or refuse to consider the full range of sentencing alternatives provided by Congress *(Leach* v. *United States*, 334 F.2d 945 (D.C.Cir.1964).

3. The decision below is in conflict with a decision of this Court holding it "essential" that complete flexibility be maintained in the sentencing process. *Burns* v. *United States*, supra.

4. The decision below is in conflict with decisions holding the Federal Probation Act to be remedial and humanitarian legislation, obligating a trial court not only to consider full probation *(Rosenwinkel* v. *Hall*, 61 F.2d 724 (7th Cir.1932), but to give comprehensive consideration to all sentencing alternatives, only possible in the exercise of untrammeled discretion *(Burns* v. *United States*, supra).

5. The intervention of this Court is needed to correct an unauthorized and dangerous intrusion by the federal judiciary upon the power of Congress alone to determine when the commission of a certain category of crime will necessarily bring about a mandatory jail sentence.

6. In view of the thirty-five years since this Court's decision in *Burns*, supra, and the annual increase in federal criminal dockets, it would be timely as well as appropriate in this case for this Court to set more comprehensive and more up-to-date guidelines for sentencing in the federal courts.

7. The question presented, which involves proper sentencing criteria, is of extreme importance to the administration of criminal justice. That the evil here under attack arose in the context of a criminal tax case means that it will not only arise again and again in the Southern District of Florida, where such litigation is heavy, but that it is likely to spread to other districts and to other crimes.

8. A district court ought not be permitted to engraft upon the Federal Probation Act, 18 U.S.C.§3651, an inflexible local rule of its own, making jail time mandatory or of any specific minimum duration for any category of federal crimes.[4]

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[4]The next logical step, in the unfortunate process of judicial legislation here involved, would be the fixing of inflexible minimum confinement periods for different classes of federal crimes.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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